(33)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 1104-1108

HUGH B. MONJAR, ALSO KNOWN AS H. B. MONJAR; JOSEPHINE T. MONJAR, ALSO KNOWN AS MRS. HUGH B. MONJAR, ALSO KNOWN AS JOSEPHINE T. DREW; ABRAHAM J. COOK, ALSO KNOWN AS A. J. COOK; JOHN FENTON JONES, ALSO KNOWN AS J. F. JONES; CLEMENT O. DREW, ALSO KNOWN AS C. O. DREW,

Petitioners,

vs.

UNITED STATES OF AMERICA

Nos. 1109-1115

DONALD F. MOORE, JOHN E. LINDH, JAMES J. FITZPATRICK, ERNEST F. WILLARD, CLARENCE W. CANDLIN, LEONARD B. CRUSER AND WALTER H. MADDAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA

REPLY BRIEF

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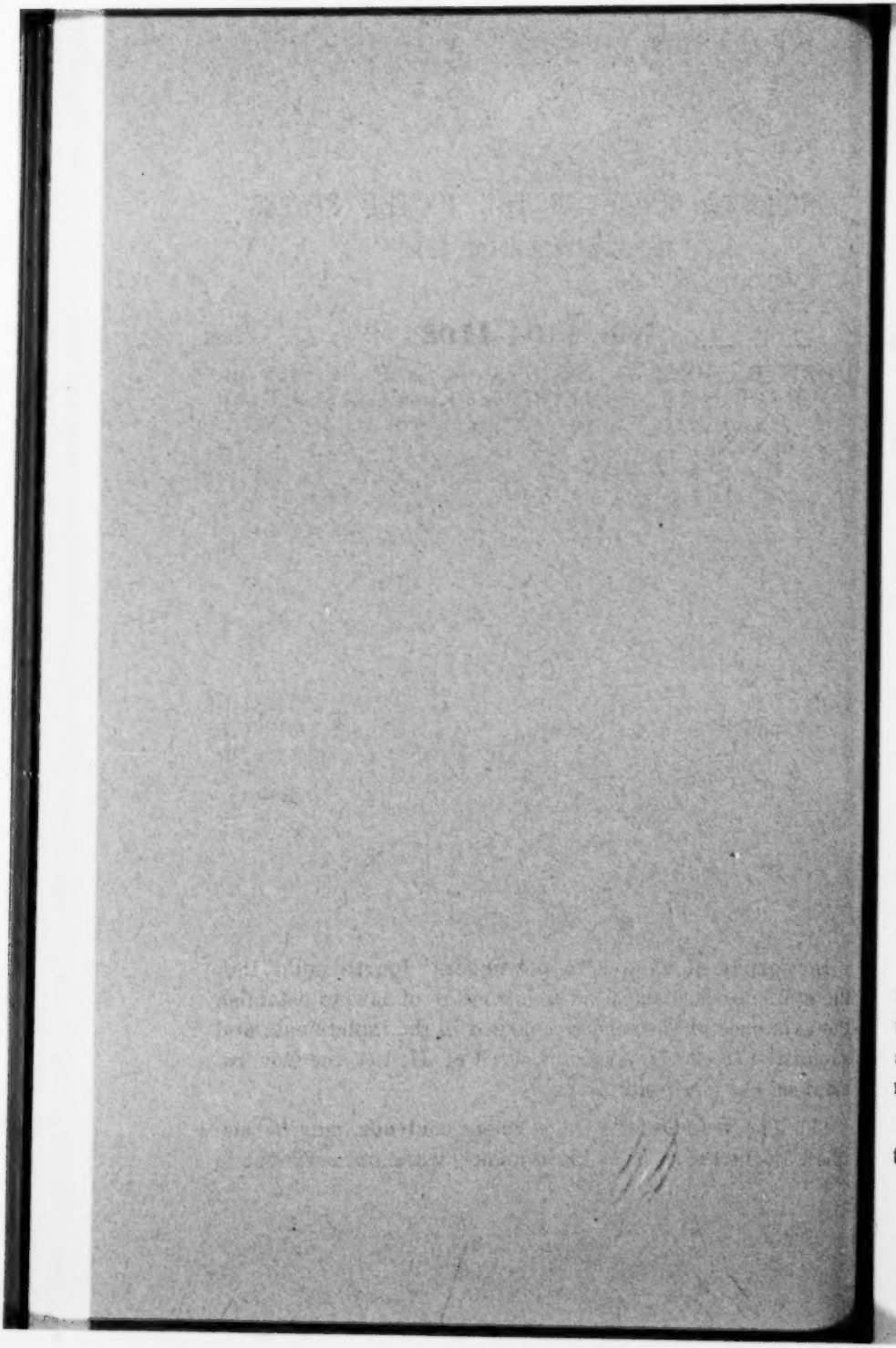

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HUGH B. MONJAR, Also Known as H. B. Monjar; JOSEPHINE T. MONJAR, Also Known as Mrs. Hugh B. Monjar, Also Known as Josephine T. Drew; ABRAHAM J. COOK, Also Known as A. J. Cook; JOHN FENTON JONES, Also Known as J. F. Jones; CLEMENT O. DREW, Also Known as C. O. Drew,

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REPLY BRIEF

In purported answer to petitioners' fourth point that the evidence is insufficient as a matter of law to establish the existence of the scheme charged in the indictments and submitted to the jury (Pet. I, 40; Pet. II, 19), the Government makes two contentions:

(1) The verdicts, the Government contends, may be justified on the theory that the evidence, while not sufficient to

show the scheme charged and submitted, is nevertheless adequate to support a finding of guilt of another scheme to defraud if such scheme had been submitted to the jury (Br. in Opp. 26). It is asserted by the Government that "The gist of the scheme charged in the indictment was the *use* of the Mantle Club as a means to defraud;" that "The personal loans, the magazine purchases, the profits from the sale of costumes, all revolved around the Mantle Club[1] and were merely particularly manifestations of the basic scheme alleged in the indictment, a scheme to *use* the Mantle Club as a means of *personal aggrandizement.*"

(2) In any event, the Government urges, the evidence was sufficient as a matter of law to sustain the finding of a scheme as submitted to the jury (Br. in Opp. 26-28).

Neither argument has support in fact or in law.

1. In essence, the suggestion is that although the prosecuting attorneys repeatedly stated that the alleged scheme to defraud included as a part thereof the formation of the Mantle Club and relied on this element as justifying introduction of much evidence otherwise inadmissible; and despite the fact that the trial court accordingly by its instructions charged that the scheme alleged in the indictment was "to create that [Mantle] Club" as an instrument of fraud and that no conviction could be had unless it was found that the scheme to defraud was devised prior to the organization of the Club, nevertheless the verdict may be sustained by restudying the evidence and suggesting another and more limited scheme which **might** have been submitted to the jury and as to which **if** submitted to the

[1] Contrary to the Government's statement (Br. in Opp. 26), petitioners do not concede directly or "in effect" that any fraud was established by the evidence.

jury and if the jury had found the defendants guilty thereon, there was evidence sufficient as a matter of law.

The argument is more than slightly "iffy."

It is hornbook law that the right to trial by jury prevents the sustaining of a verdict on some ground other than that submitted to and considered by the jury. As stated in *Hendrey* v. *United States*, 233 Fed. 5, 16 (C. C. A. 6, 1916):

> "it cannot be permitted that any respondent shall be charged with one crime and convicted of another merely because the latter is developable out of the proof which fails to show the crime charged."

The Government seems to contend that the *use* of the Club involved a decision at some time (without stating any time) to use the Club generally from that time on for fraudulent purposes. For the costume transaction, the Key magazine transaction, the payment of salaries, etc., to which the Government refers, all occurred at different times and the scheme to *use* the Club could hardly include all those transactions unless the "use" means to use it generally from some time forward.

Our position is that it is impossible for this Court to assume that the jury found the defendants guilty of a scheme to use the Club in this broader sense, when the Government at the trial did not urge and the court in its instructions did not charge that such was the kind of scheme of which the defendants were accused.

The Government seeks to suggest an interpretation of the scheme charged in the indictment by which it may justify all the evidence introduced and a verdict of guilty. Aside from our proposition that this is a scheme different from that on which the defendants were tried and as defined by the trial court, the Government's argument involves the additional flaw that such a scheme is not necessarily the scheme on which the jury based its verdicts of guilty. It

certainly is as reasonable to believe that they erroneously found the defendants guilty of different schemes, *i. e.*, guilty of the scheme as charged by the court, or guilty of one or more other schemes: to sell PL's fraudulently; to purchase American Key; to sell the Code of Ethics or the Supplement to the Code of Ethics; to purchase costumes; to set up various business corporations named in the indictment; to pay themselves salaries, etc., and to set up the Independence Club. With respect to practically all of these transactions the evidence of fraud was insufficient as a matter of law but, if it is permissible to speculate as to which scheme the jury may have chosen to rely upon, then it cannot be said that the jury may not have founded its verdicts on the determination, erroneous in law, that one or more of these transactions were fraudulent even though the evidence was insufficient as to it or them.

Even if it were permissible to assume that the jury ignored the instructions of the court as to what constituted the scheme charged, and instead ranged guideless through the evidence and found the defendants guilty of furthering or employing some other scheme—which must necessarily be known only to the jurors—this would still be an obviously inadequate premise upon which to base the contention of the government that the scheme upon which the verdicts were founded was that which for the first time is now suggested by the Government. For it is plain that once the charge to the jury is ignored the court must embark on a sea of speculation as to what scheme the jury may have relied upon and there is opened up a whole series of equally permissible hypotheses as to what the jury may have relied upon as the basis of the verdicts. It could be urged with equal force that the jury might possibly have found that one or more of the several transactions mentioned in the indictment were fraudulent (though there was no sufficient evidence to sus-

tain a verdict of guilty as to any defendant except possibly as to personal loans). In other words, if this Court considers any scheme other than that which was urged at the trial by the Government and defined by the trial court in its charge, there is no way of knowing what kind of a fraudulent use of the Club the jury found, nor whether there was more than one kind of fraudulent use of the Club. Therefore, if we depart from the scheme charged by the court, there are many transactions which were in evidence and may have been relied upon by the jury as the basis for its verdicts and many of these transactions were clearly inadequate to support a finding of a scheme to defraud. It follows that this Court should not support a verdict on the ground that *if* the scheme to defraud now suggested by the Government had been submitted to the jury and *if* it was the basis of the jury's verdicts, the evidence is sufficient to sustain such verdicts.

The Government suggests (Br. in Opp. 26) that the indictment alleges "a scheme to use the Mantle Club as a means of personal aggrandizement." Government counsel never mentioned such a scheme at the trial, and it is different from the scheme specified by the trial judge in his charge to the jury. A scheme to use the Mantle Club for personal aggrandizement is entirely too flexible under the evidence in this case. If it is intended to mean the use of the Club for personal aggrandizement by the sale of PL's, such would hardly apply to anyone except Mr. Monjar, who was the one who profited thereby. There is no sufficient evidence to justify a verdict that any other transaction was fraudulent. Therefore, no other defendant used the Club for his aggrandizement. With this understanding of the use of the Club, a conviction even of Monjar would be faulty because of the refusal of the trial court to take from the jury the evidence as to all transactions other than the personal loans.

2. Careful examination of the Government's brief in opposition discloses that it does not even purport to answer, other than by denial in the form of a mere conclusion, petitioners' contention that under the judge's charge the verdict was sustainable only by resort to an arbitrary and illicit retrospective presumption as to the existence of fradulent purpose at the time of the formation of the Mantle Club (Pet. I, 41, 46-50; Pet. II, 19-20). The Government states (Br. in Opp. 26-27):

> "Monjar's whole course of action, prior and subsequent to the establishment of the Mantle Club, shows that he used his ability to organize and lead groups of men as a means of securing funds for his personal use, and justifies a conclusion by the jury that at least Monjar schemed from the start to use the Mantle Club as a device to defraud."

With respect to Monjar's course of action prior to the establishment of the Mantle Club the Government sets out the facts upon which it relies at pages 9 and 10 of its Brief in Opposition. It is highly significant that none of the facts there outlined permit of the inference that Monjar in using "his ability to organize and lead groups of men as the means of securing funds for his personal use" did so in any manner amounting to fraud.

The only other reference to the evidence as to the existence of a scheme at the time of the organization of the Club appears in the Government's conclusion, again without reference to any supporting evidence (Br. in Opp. 28), "since the evidence amply warrants an inference that at least one petitioner, Monjar, had devised the scheme to defraud as far back as 1928 * * *."

We have demonstrated in our main brief the fallacy of the reasoning of the circuit court of appeals, and as shown above, the Government in its brief does not even purport

by reference to the record to show any support in the evidence to sustain its assertion (Br. in Opp. 26) that there was evidence of fraudulent purpose in the organization of the Club.

Conclusion

The arguments of the Government addressed to the other points of the petitions requires no reply.

May, 1945.

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